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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 745

ABRAHAM MOSKOW et al

v.

BOSTON REDEVELOPMENT AUTHORITY et al

REPLY BRIEF FOR PETITIONERS

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This case, as it now stands on petition, record and opposition briefs, reminds one of an incident in a detective story of an older generation:

> "Is there any other point to which you would wish to draw my attention?"
> "To the curious incident of the dog in the night-time."
> "The dog did nothing in the night-time."
> "That was the curious incident," remarked Sherlock Holmes.[1]

Counsel for defendants now argue that the declaratory judgment we attack was a normal, routine, expectable consequence of a well-established rule of Massachusetts practice. Yet no defendant asked in his brief that the well-

[1] Sir Arthur Conan Doyle, "Silver Blaze," in "The Memoirs of Sherlock Holmes".

established practice be applied in his favor. No one asked that a declaratory judgment be entered. Each was content to ask that the bill be dismissed. (Pet., App. D, pp. 44-46.) That is the curious incident.

Is it credible that five counsel refrained deliberately from seeking relief to which they were entitled under well-established practice?

If, on the other hand, there was no such rule of practice; if, in fact, no counsel had then imagined such a rule, the inaction of counsel is perfectly explicable; indeed, it needs no explanation. The incident ceases to be curious, as did the incident of the dog in the story when all the facts were known.

It strongly appears, we suggest, that the alleged rule of Massachusetts practice was sought for after the event, in the understandable desire to hold on to a treasure which, to the obvious astonishment of counsel, had fallen from the skies. All that the industry and ingenuity of counsel has been able to produce, in support of the alleged rule of practice, is the case of *Willcutt* v. *Prescott,* 340 Mass. 532, in which the plaintiff himself asked the court to enter a declaratory judgment (Pet., App. E, p. 47), and in which the Court itself was able to say in its opinion: "There are no facts in dispute . . ." 340 Mass. 532, 535.[2]

The City of Boston urges that plaintiffs have already been fully heard on the question *what* declaration should enter. But clearly the plaintiffs did not ask the Supreme Judicial Court to enter a declaration that the taking was invalid (Pet., App. D, p. 44) and such a request could not have been granted if they had made it, because that would have unconstitutionally deprived defendants of their right to answer. *Hovey* v. *Elliott,* 167 U.S. 409. The plaintiffs'

[2] It is difficult to believe that the Supreme Judicial Court made this pointed statement without any basis. Probably it is the result of statements of counsel at the oral argument.

problem was to show that they had standing to attack the taking, and that, therefore, the bill should not be dismissed. If, in making out that standing, objections to the taking itself were mentioned, it by no means follows that the plaintiffs were fully heard on that question. If we should allude later in this brief (as we do) to some of the consequences which would occur if this Court reversed the Supreme Judicial Court, we think it does not follow, if the writ should issue, that we are entitled to no further argument. In a case where elaborate findings with respect to the merits of a case had been made after lengthy hearings upon the question of a preliminary injunction, it was held to be error to grant a motion for summary judgment on the basis of those findings. *Progress Development Corporation* v. *Mitchell,* (C.A. 7th, 1961) 286 F.2d. 222, 231, 234.

Counsel for the Division of Urban Renewal in effect argues that what was done here by the Supreme Judicial Court could properly be done by a Federal Court on a motion brought under Rule 12(c). (Brief, p. 7.) Counsel has overlooked the fact that such a motion cannot be made until the pleadings are closed.

The constitutional deprivation in this case, the denial in toto of a hearing, is of far greater moment than the error corrected by this court in *Saunders* v. *Shaw,* 244 U. S. 317, where appellant had been precluded from putting a part of the evidence. In that case this court gave relief though it was strongly argued that a remand would be a *"mere concession to technicality."* Recognizing the force of that argument this court said

> "... It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in." (344 U. S. 317, 319.)

The present record strongly indicates that a remand in this case, far from being a "mere concession to technicality," will give the plaintiffs the hearing to which they are constitutionally entitled, in a case of weight and substance. No one has a right to assume or suggest that the result of that hearing will necessarily be in favor of defendants. We are bound, on the contrary, to assume that every Massachusetts judge before whom the case may come on remand, will be as open to conviction, either way, as the two judges who dissented below:

> ". . . We are limited to the actual allegations of the bill. The Authority and the bank have chosen to stand on their demurrers and thereby admit those allegations. That there may be facts which justify the taking of the plaintiffs' building for the Project is beside the point. If there be such facts they are not before us in any form. There is no answer; there is no denial. There is no fact of which judicial notice may be taken which compels a determination that the taking was legal. The Authority and the bank should be held to the consequences of their pleadings and be required to go to trial as would any other litigant." (Pet., App. A, pp. 32-33)

Conclusion

For the reasons above considered the writ of certiorari should issue.

Respectfully submitted,

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